



**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION**

**Technical Analysis  
for  
Proposed Administrative Civil Liability  
Contained in Complaint No. R9-2009-0089  
County of San Diego**

**Violations of Order No. R9-2007-0001**

**November 25, 2009**

**by  
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## 1. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence supporting administrative assessment of civil liability in the amount of **\$77,800** against the County of San Diego (County) pursuant to Water Code section 13385 for violations of California Regional Water Quality Control Board, San Diego Region (Regional Board) *Order No. R9-2007-0001, NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority* (Permit, See **Exhibit 1**) as alleged in Complaint No. R9-2009-0089 (Complaint, See **Exhibit 2**).

On November 16, 1990, the United States Environmental Protection Agency (US EPA) amended its National Pollutant Discharge Elimination System (NPDES) Permit regulations to include permit application requirements for storm water discharges (40 CFR Parts 122, 123, and 124). The regulations require operators of large and medium municipal separate storm sewer systems (MS4s)<sup>1</sup> to obtain a NPDES permit and to reduce pollutants in storm water discharges to the Maximum Extent Practicable (MEP)<sup>2</sup> to achieve water quality standards. The County owns and operates a MS4 through which it discharges urban runoff to waters of the United States within the San Diego Region. Therefore, after receiving a report of waste discharge from the County, the Regional Board adopted the Permit on January 24, 2007. The Permit named the County, the incorporated cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority as Copermittees. The Permit renewed NPDES Permit No. CAS0108758, which was first issued by the Regional Board on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01).

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<sup>1</sup> The County satisfies the federal definition of a "large municipal separate storm sewer system." See 40 CFR 122.26(b)(4)(ii).

<sup>2</sup> Maximum Extent Practicable (MEP) – The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control Best Management Practices (BMPs). MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than Best Available Technology (BAT). A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their urban runoff management programs. Their total collective and individual activities conducted pursuant to the urban runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the Regional Board, the Regional Board defines MEP. See Attachment C to the Permit.

## 2. ALLEGATIONS

The following allegations against the County are the basis for assessing administrative civil liability pursuant to Water Code section 13385, and also appear in the Complaint.

### 2.1. County Failed to Provide Adequate Authority to Achieve Full Permit Compliance

The County violated Permit Provision D.2.a.(1) on March 24, 2008<sup>3</sup>, when it amended its storm water ordinance on March 12, 2008, by changing the definition of “Rainy Season” from “October 1 through April 30” to “November 11 through April 30” contrary to the Permit’s definition of “October 1 through April 30 of each year<sup>4</sup>.” On August 5, 2009, the County corrected the definition to comply with the Permit. Therefore, the days of violation are 498 (March 24, 2008, to August 4, 2009).

### 2.2. County Failed to Require Construction Site BMPs<sup>5</sup> During the Wet Season

The County violated Permit Provision D.2.c.(3) by failing to require “slope stabilization on all inactive slopes during the Rainy Season” from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008. The County Department of Public Works Director’s Letter of Instruction (DLI, See **Exhibit 4**) which took effect on October 18, 2000, states that “[d]uring the Non-Rainy Season from May 1 through November 10, the Developer may opt to employ ‘weathered triggered’ action plans<sup>6</sup> in lieu of fully deployed BMPs.” As a result, the County allowed Developers to leave inactive slopes unprotected from October 1 to November 10 in 2007 and 2008, if the Developer implemented a “weather triggered” action plan. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008).

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<sup>3</sup> On December 12, 2007, the Regional Board adopted Addendum No. 1 to Order No. R9-2007-0001 (Order) that extended various Order due dates by 60 days at the Copermittees’ request in recognition of the Copermittees’ staff being diverted to emergency response as a result of the November 13, 2007, wildfires. See **Exhibit 3**, Addendum No. 1. Specifically, paragraph 1.b. of the Addendum requires Copermittees to review and update their grading ordinances and other ordinances as necessary to achieve full compliance with the Order within 425 days of adoption of the Order. The Order was adopted on January 24, 2007, therefore the County was required to review and update its ordinance no later than March 23, 2008.

<sup>4</sup> Permit Attachment C, Definitions, defines “Wet Season” as “October 1 through April 30 of each year.” Note “Wet Season” and “Rainy Season” are used interchangeably throughout the Permit.

<sup>5</sup> Best Management Practices (BMPs) “means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘waters of the United States.’ BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” See 40 CFR 122.2.

<sup>6</sup> A “weather triggered” action plan allows the developer to store on site 125% of the necessary BMP materials that are to be deployed within 48 hours of a 50% chance or greater rain event of 0.5 inches or more.

2.3. County Failed to Inspect Construction Sites During the Wet Season

The County violated Permit Provision D.2.d.(1-3) by failing to inspect construction sites during the Wet Season from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008, because the County's inspection frequencies were based upon the County's Wet Season and therefore didn't begin until November 11. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008).

Each of the allegations was outlined in Notice of Violation (NOV) No. R9-2008-0164, issued on December 23, 2008, to the County of San Diego.

**3. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY**

Pursuant to Water Code section 13385(a)(1-3),

"Any person who violates any of the following shall be liable civilly in accordance with this section:

1. Section 13375 or 13376.
2. Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.
3. Any requirements established pursuant to Section 13383."

Furthermore, Water Code section 13385(c) provides that

"Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

Water Code section 13385(e) requires the Regional Board to consider several factors when determining the amount of civil liability to impose. These factors include: "...the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts

undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

**3.1. ALLEGATION 1: County Failed to Provide Adequate Authority to Achieve Full Permit Compliance**

The County violated Permit Provision D.2.a.(1) on March 24, 2008, when it amended its storm water ordinance on March 12, 2008, by changing the definition of “Rainy Season” from “October 1 through April 30” to “November 11 through April 30” contrary to the Permit’s definition of “October 1 through April 30 of each year.” On August 5, 2009, the County corrected the definition to comply with the Permit. Therefore, the days of violation are 498 (March 24, 2008, to August 4, 2009).

**3.1.1. Nature, Circumstances, Extent, and Gravity of the Violation**

Permit Provision D.2.a.(1) requires the County to do the following: “Within 365 days of adoption of this Order, each Copermittee shall review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.” Permit Attachment C, Definitions, defines “Wet Season” as “October 1 through April 30 of each year.” The terms “Wet Season” and “Rainy Season” are used interchangeably throughout the Permit. On December 12, 2007, the Regional Board extended the review and update deadline by 60 days in Addendum No. 1 to R9-2007-0001. See Footnote 3.

On March 12, 2008, the County amended its Storm Water Ordinance (March 12, 2008, Ordinance, See **Exhibit 5** at section 1) [Ordinance No. 9926 (New Series), An Ordinance Amending Title 6, Division 7, Chapter 8 and Section 87.205 Through 87.20-8, 87.218 and 87.414 of the San Diego Code of Regulatory Ordinances Relating to Watershed Protection, Stormwater Management and Discharge Control and Grading] with the stated purpose to “conform with the requirements of California Regional Water Quality Control Board, San Diego Region Order No. R9-2007-0001, NPDES No. CAS0108758.” One of the amendments that the County made to its Ordinance was to change the definition of “Rainy Season” from “October 1 through April 30” to “November 11 through April 30.” Although the Regional Board’s “Wet Season” definition existed informally under Order No. 90-42, it was formally included in Order No. R9-2001-0001 (adopted February 21, 2001) and in the Permit. Furthermore, the County had the correct definition in its Storm Water Ordinance from its initial adoption on August 5, 2003 (August 5, 2003, Ordinance, See

**Exhibit 6)**, until the March 12, 2008, amendment.

On August 5, 2009, the County after receiving a Regional Board NOV and at the urging of Regional Board staff corrected the definition by amending its storm water ordinance to conform to the Permit (August 5, 2009, Ordinance, See **Exhibit 7**).

The County's modification of the Wet Season definition fundamentally alters the approach to preventing and reducing storm water pollution. The Permit and the County's guidance materials (e.g., DLI) all recognize that there is a greater threat to water quality during the Wet Season than during the Dry Season and, therefore, a need for more stringent requirements during the Wet Season (e.g., minimization of grading, stabilization of inactive slopes, and increased number of required construction inspections.). By unilaterally eliminating 40 days off the 211-day Wet Season (or 19%), the County is failing to prevent and reduce storm water pollution during the time of greatest threat to water quality. The County's definition is not only contrary to the Permit, but also contrary to the California State Water Resources Control Board's statewide NPDES Construction Storm Water Permit (Order No. 99-08-DWQ).

The gravity of the violation is serious. The failure to have a consistent "Wet Season" definition has a tremendous impact on how the County implements its storm water program as stated above. It is not merely a "process" violation, as suggested by the County, because the failure to implement the more rigorous and protective "Wet Season" program for the first 40 days of the Wet Season can be catastrophic to the beneficial uses of the receiving waters. The first storm events of the Wet Season often contain the greatest amount of pollutants (i.e., greater toxicity). The long dry period from May to October in Southern California allows contaminants to build up. The first large rainfall of the Wet Season generally mobilizes the built-up contaminants, creating a larger discharge of pollutants. This phenomenon is called "first flush." At construction sites, these pollutants would include sediment and common building materials and waste, such as concrete, metals, asphalt, trash, and others. Therefore, by failing to prevent and reduce the storm water pollution during the first part of the Wet Season, the County may be allowing the largest concentration of pollutants to be discharged with little or no treatment.

The County's MS4 discharges into the following Hydrologic Units as described in the Regional Board's Basin Plan:

- Santa Margarita (902.00);
- San Luis Rey (903.00);
- Carlsbad (904.00);
- San Dieguito (905.00);
- Peñasquitos (906.00);
- San Diego (907.00);
- Pueblo San Diego (908.00);
- Sweetwater (909.00);
- Otay (910.00); and
- Tijuana (911.00).

These Hydrologic Units have the following designated beneficial uses as described in the Regional Board's Basin Plan:

- Aquaculture (AQUA);
- Agricultural Supply (AGR);
- Cold Freshwater Habitat (COLD);
- Commercial and Sport Fishing (COMM);
- Contact Water Recreation (REC-1);
- Estuarine Habitat (EST);
- Freshwater Replenishment (FRSH);
- Ground Water Recharge (GWR);
- Hydropower Generation (POW);
- Industrial Process Supply (PROC);
- Industrial Service Supply (IND);
- Inland Saline Water Habitat (SAL);
- Marine Habitat (MAR);
- Migration of Aquatic Organisms (MIGR);
- Municipal and Domestic Supply (MUN);
- Navigation (NAV);
- Non-contact Water Recreation (REC-2);
- Preservation of Biological Habitats of Special Significance (BIOL);
- Rare, Threatened, or Endangered Species (RARE);
- Shellfish Harvesting (SHELL);
- Spawning, Reproduction, and/or Early Development (SPWN);
- Warm Freshwater Habitat (WARM); and
- Wildlife Habitat (WILD).

### **3.1.2. Discharge's Susceptibility to Cleanup and Abatement, and Degree of Toxicity**

The alleged violation is not subject to cleanup. The potential degree of toxicity in storm water discharges affected by the violation is high based on the nature of materials at construction sites as described above in Section 3.1.1.

**3.1.3. Discharger's Ability to Pay and Ability to Continue Its Business**

According to the Comprehensive Annual Financial Report of the County for the fiscal year 2007/08 dated December 10, 2008, the County's net assets exceed its liabilities as summarized below.

*Net assets* may serve over time as a useful indicator of a government's financial position. In the case of the County, assets exceeded liabilities by \$3.22 billion at the close of fiscal year 2008, an increase of \$273 million or 9% over fiscal year 2007. This included an increase of \$200 million in the County's restricted and unrestricted net assets (a 47% increase over fiscal year 2007) and an increase of \$73 million in capital assets, net of related debt (a 3% increase over fiscal year 2007).

The County can pay the recommended civil liability for the alleged violations and continue to operate.

**3.1.4. Degree of Culpability and Voluntary Cleanup Efforts**

The County exhibits a high degree of culpability relative to this alleged violation. The County intentionally changed its ordinance from the correct "Wet Season" definition to a definition that suited its interests in direct disregard of the Permit. It was not until the Regional Board issued an enforcement action to the County notifying it of the violation that the County finally agreed to rectify the matter.

The County in its NOV response stated that it had an understanding with Regional Board staff that there would be no enforcement actions stemming from the County's differing definition and practices. To support this claim the County cited a section of the 2002/03 and 2003/04 Annual Reports where it noted the County's requirement that developers have vegetated slopes stabilized by November 11<sup>th</sup>. While an obscure statement of a deviation of a requirement from a comprehensive storm water permit in a four-inch thick annual report from 2003 and 2004 may have given the Regional Board notice of the County's desire to use a different Wet Season start date, it clearly was not a direct communication of the County's desire to change the definition of the Wet Season and request and obtain immunity from prosecution.

Had the County wanted to redefine the Wet Season either solely for itself or for all of the Copermittees, the appropriate action would have been to request it in the Report of Waste Discharge (i.e., Permit application period)



or during the comment period for the draft permit. The Regional Board record is silent to this matter. The County may have raised this matter during initial Copermittee meetings regarding the reissuance of the permit; however, the Regional Board never approved the change orally or in writing, and both the Permit as well as the previous permit specifically define the Wet Season as beginning on October 1<sup>st</sup>. Therefore, it was unreasonable for the County to believe that the Regional Board would not pursue an enforcement action against it for amending its Ordinance contrary to the Permit's Wet Season definition.

### **3.1.5. Prior History of Violations**

During the last nine years, the Regional Board has issued the County seven Notice of Violations (NOVs), seven Notices to Comply (NTCs), and one Staff Enforcement Letter (SEL) for alleged violations of its storm water permits. The Regional Board in its seven NOVs cited the County four times for failing to implement BMPs; twice for failing to prohibit illicit discharges, once for failing to require BMPs; once for failing to enforce its storm water ordinance; and once for failing to report required information. None of the previous violations addressed the County's use of a different Wet Season.

### **3.1.6. Economic Benefit or Savings**

Pursuant to the State Board's *Water Quality Enforcement Policy*, liability assessments should at a minimum take away whatever economic savings a discharger gains as a result of those violations. Furthermore, Water Code section 13385 (e) requires that "at a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." Regional Board staff was unable to determine if the County enjoyed an economic benefit by amending its storm water ordinance to shorten the Wet Season. The economic benefit for the related allegations that stem from this violation is summarized in Section 3.3.6.

### **3.1.7. Other Matters That Justice May Require**

Over the course of trying to resolve this matter with the County, the Regional Board invested 68.5 hours to investigate, prepare enforcement documents, and consider this action. The total investment of the Regional Board to date is \$10,374. See **Exhibit 8**, Staff Time Log and Costs.

## **3.2. ALLEGATION 2: County Failed to Require Construction Site BMPs During the Wet Season**

The County violated Permit Provision D.2.c.(3) by failing to require "slope stabilization on all inactive slopes during the Rainy Season" from October 1,

2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008. The County Department of Public Works Director's Letter of Instruction (DLI) states that "[d]uring the Non-Rainy Season from May 1 through November 10, the Developer may opt to employ 'weathered triggered' action plans<sup>7</sup> in lieu of fully deployed BMPs." As a result, the County allowed Developers to leave inactive slopes unprotected from October 1 to November 10 in 2007 and 2008, if the Developer implemented a "weather triggered" action plan. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008).

### **3.2.1. Nature, Circumstances, Extent, and Gravity of the Violation**

Storm water pollution regulatory programs differentiate between the Wet and Dry Seasons by increasing the Pollution Prevention and Pollution Reduction requirements during the Wet Season in recognition of the increased threat posed by precipitation events during the Wet Season to cause storm water pollution. This logical, fair and reasonable regulatory design weighs the developer's desire to construct without impediments versus the State's mission to prevent and reduce storm water pollution. Therefore, the Regional Board gives the County the flexibility to require lesser standards during the Dry Season, but require greater regulatory measures during the Wet Season (e.g., increased inspections, slope stabilization on inactive slopes, and minimization of grading) when there is a greater threat.

The County frustrated the intent of the Permit by unilaterally reducing the first 40 days of the Wet Season. The County allowed developers to leave their sites exposed during the first 40 days of the Wet Season during 2007 and 2008. While developers were given the option to use "weather triggered" action plans, these plans are not as protective against storm water pollution. A "weather triggered" action plan allows the developer to store on site 125% of the necessary BMP materials that are to be deployed within 48 hours of a 50% chance or greater rain event of 0.5 inches or more instead of requiring that all surfaces but those actively being graded be protected from erosion and sedimentation. Therefore, some sites although well staged with BMP materials, may not have BMPs deployed to prevent storm water pollution from occurring during a storm event.

There were at least three storm events during the disputed periods over the two years during which the County failed to require developers to

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<sup>7</sup> A "weather triggered" action plan allows the developer to store on site 125% of the necessary BMP materials that are to be deployed within 48 hours of a 50% chance or greater rain event of 0.5 inches or more.

adequately protect with BMPs against storm water pollution. During the 2007 Wet Season, San Diego County experienced its first storm event on October 13<sup>th</sup> with rainfall of 0.21 inches. A second storm event occurred on October 17<sup>th</sup> with rainfall of 0.13 inches. There were no other storm events during the disputed period of October 1<sup>st</sup> through November 10<sup>th</sup> of 2007. During the 2008 Wet Season one storm event during the disputed period occurred on November 4<sup>th</sup> with rainfall of 0.14 inches<sup>8</sup>.

**3.2.2. Discharge's Susceptibility to Cleanup and Abatement, and Degree of Toxicity**

The alleged violation is not subject to cleanup; and the County cannot retroactively require that construction sites implement BMPs that would have protected the sites during storm events that occurred from October 1 through November 10 of 2007 and 2008. The potential degree of toxicity in storm water discharges affected by the violation is high based on the nature of materials at construction sites.

**3.2.3. Discharger's Ability to Pay and Ability to Continue Its Business**

See Section 3.1.3 above.

**3.2.4. Degree of Culpability and Voluntary Cleanup Efforts**

The County again exhibits a high degree of culpability because it did not require developers to implement BMPs as required by the Permit during the contested period.

**3.2.5. Prior History of Violations**

See Section 3.1.5 above.

**3.2.6. Economic Benefit or Savings**

Pursuant to the State Board's *Water Quality Enforcement Policy*, liability assessments should at a minimum take away whatever economic savings a discharger gains as a result of those violations. Furthermore, Water Code section 13385 (e) requires that "at a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." Regional Board staff were unable to determine what if any economic savings the County enjoyed by not requiring developers to implement BMPs. The economic benefit for the related allegation that stem from this violation is summarized in

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<sup>8</sup> Storm event data was obtained from the Weather Underground ([www.wunderground.com](http://www.wunderground.com)), a commercial weather service that provides real-time weather information via the Internet. Weather Underground provides weather reports for most major cities across the world on its website, as well as local weather reports for newspapers and websites (e.g., Associated Press, the San Francisco Chronicle, and Google.). Most of its United States information comes from the National Weather Service.

Section 3.3.6.

**3.2.7. Other Matters That Justice May Require**

See Section 3.1.7. above.

**3.3. ALLEGATION 3: County Failed to Inspect Construction Sites During the Wet Season**

The County violated Permit Provision D.2.d.(1-3) by failing to inspect construction sites during the Wet Season from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008, because the County's inspection frequencies were based upon the County's Wet Season and therefore didn't begin until November 11<sup>9</sup>. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008).

**3.3.1. Nature, Circumstances, Extent, and Gravity of the Violation**

The County failed to inspect construction sites during the contested Wet Season period. At the very least, if inspections occurred during the contested period, the County inspectors applied a lesser review standard based on the DLI (i.e., a construction site may have been credited with having adequate BMPs when there were inadequate BMPs). The County reported in its January 30, 2009, response to NOV No. R9-2008-0164 that in 2007 it failed to inspect six High Priority sites and 111 Medium Priority sites. In 2008 the County reported that it failed to inspect four High Priority sites; and three Medium Priority sites. See **Exhibit 10**, January 30, 2009, County Report without attachments, Tables 1 and 2 at page 7. The County as part of its storm water program prioritizes construction sites as "High," "Medium" or "Low" based upon a construction site's BMP maintenance requirements and a site's storm water pollution potential to receiving waters. See **Exhibit 11**, Section 4.4.4.4.2 "Treatment Control BMP Prioritization" at Page 20 of the County of San Diego's Jurisdictional Urban Runoff Management Program submitted March 24, 2008.

Failure to inspect construction sites at the beginning of the Wet Season can lead to large discharges of storm water pollutants in terms of quantity and toxicity because the sites will not be protected by BMPs that would have caught the Wet Season's "first flush" of pollutants that accumulated during the Dry Season as previously discussed. Inspections just prior to the Wet Season or during its first weeks are important because it allows regulatory agencies like the County and the Regional Board to ensure that

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<sup>9</sup> On September 30, 2008, the County informed the Regional Board in its Jurisdictional Urban Runoff Management Plan, Annual Report Fiscal Year 2007-2008 (Report) that it began complying with Order No. R9-2007-0001's construction site inspection requirements on July 1, 2007. (See Exhibit 9, Report at page 3-16.)

adequate BMPs are installed before the first storm event hits a site. During the Wet Season storm water regulatory agencies shift their emphasis from prevention of illegal/illicit dischargers to the storm water conveyance system to erosion prevention. Construction inspections just prior to the Wet Season or during the Wet Season, but prior to the first storm event, ensure and encourage that Developers implement the necessary BMPs to protect receiving waters.

**3.3.2. Discharge's Susceptibility to Cleanup and Abatement, and Degree of Toxicity**

The alleged violation is not subject to cleanup; and the County cannot retroactively conduct the inspections to ensure that adequate BMPs were in place to prevent pollution of the receiving waters. Again, the inspections would have ensured that BMPs were in place to prevent the "first flush" of pollutants from entering the receiving waters.

**3.3.3. Discharger's Ability to Pay and Ability to Continue Its Business**

See Section 3.1.3 above.

**3.3.4. Degree of Culpability and Voluntary Cleanup Efforts**

The County again exhibits a high degree of culpability because it intentionally did not conduct some of the required inspections during the first 40 days of the 2007 and 2008 Wet Seasons and, therefore, was unable to ensure that adequate BMPs were in place to prevent polluted discharges of storm water from entering receiving waters.

**3.3.5. Prior History of Violations**

See Section 3.1.5 above.

**3.3.6. Economic Benefit or Savings**

Pursuant to the State Board's *Water Quality Enforcement Policy*, liability assessments should at a minimum take away whatever economic savings a discharger gains as a result of those violations. Furthermore, Water Code section 13385 (e) requires that "at a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

Based upon the County's reported number of missed inspections and its average inspection cost, the County enjoyed an economic benefit of \$17,510 during 2007 and \$2,261 during 2008; for a total of \$19,771. The figures were calculated using the U.S. EPA's BEN model. See **Exhibit 12**, BEN Calculation Summary. The Regional Board used the following figures and assumptions:

2007 Construction Inspection Costs Avoided: \$14,334<sup>10</sup>  
2008 Construction Inspection Costs Avoided: \$1,820  
2007 Compound Rate: 4.7%  
2008 Compound Rate: 4.9%  
Estimated Compliance Date: March 12, 2010.

### **3.3.7. Other Matters That Justice May Require**

See Section 3.1.7. above.

## **4. Maximum Civil Liability Amount**

Pursuant to Water Code section 13385 the maximum civil liability that the Regional Board may assess is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and (b) ten dollars (\$10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up. Section 13385(e) requires that, when pursuing civil liability under Water Code section 13385, "At a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

### **4.1. Failure to Provide Adequate Authority to Achieve Full Permit Compliance**

The County violated Permit Provision D.2.a.(1) on March 12, 2008, when it amended its storm water ordinance by changing the definition of "Rainy Season" from "October 1 through April 30" to "November 11 through April 30" contrary to the Permit's definition of "October 1 through April 30 of each year." On August 5, 2009, the County corrected the definition to comply with the Permit. Therefore, the days of violation are 498 (March 24, 2008, to August 4, 2009). Therefore, the maximum liability that the Regional Board may assess is \$4.98 million.

### **4.2. Failure to Require Construction Site BMPs During the Wet Season**

The County violated Permit Provision D.2.c.(3) by failing to require "slope stabilization on all inactive slopes during the Rainy Season" from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008. The County Department of Public Works Director's Letter of Instruction (DLI) states that "[d]uring the Non-Rainy Season from May 1 through November 10, the Developer may opt to employ 'weathered triggered' action plans in lieu of fully deployed BMPs." As a result, the County allowed Developers to leave inactive slopes unprotected from October 1 to November 10 in 2007 and 2008, if the Developer implemented a "weather triggered" action plan. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to

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<sup>10</sup> See **Exhibit 13**, Calculation of avoided construction inspection costs. Note the benefit accrues until liability payment is received.

November 10, 2008). Therefore, the maximum liability that the Regional Board may assess is \$800,000.

**4.3. Failure to Inspect Construction Sites During the Wet Season**

The County violated Permit Provision D.2.d.(1-3) by failing to inspect construction sites during the Wet Season from October 1, 2007, to November 10, 2007, and from October 1, 2008, to November 10, 2008, because the County's inspection frequencies were based upon the County's Wet Season and therefore didn't begin until November 11. Therefore, the days of violation are 80 (October 1 to November 10, 2007, and October 1 to November 10, 2008). Therefore, the maximum liability that the Regional Board may assess is \$800,000.

The total maximum liability that could be imposed by the Regional Board for these violations is \$6.58 million.

**5. Proposed Civil Liability Per Violation**

The proposed amount of civil liability attributed to each violation was determined by taking into consideration the factors listed in Water Code Section 13385, as well as the maximum civil liability that the Regional Board may assess.

**5.1. Failure to Provide Adequate Authority to Achieve Full Permit Compliance**

The proposed liability is \$100 per day for 498 days of violation resulting in a liability of \$49,800.

**5.2. Failure to Require Construction Site BMPs During the Wet Season**

The proposed liability is \$100 for 80 days of violation resulting in a liability of \$8,000.

**5.3. Failure to Inspect Construction Sites During the Wet Season**

The proposed liability is \$250 for 80 days of violation resulting in a liability of \$20,000.

**6. Total Proposed Administrative Civil Liability**

The total proposed civil liability in this matter is \$77,800.

**Exhibit List**  
**Technical Analysis**  
**for**  
**ACL Complaint R9-2009-0089**

1. Permit Order No. R9-2007-0001, *NPDES No. CAS0108758, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority*
2. Administrative Civil Liability Complaint Order No. R9-2009-0089
3. Addendum No. 1 to Order No. R9-2007-0001
4. County Department of Public Works Director's Letter of Instruction
5. March 12, 2008, County Ordinance
6. August 5, 2003, County Ordinance
7. August 5, 2009, County Ordinance
8. Regional Board Staff Time Log
9. County Jurisdictional Urban Runoff Management Plan, Annual Report Fiscal Year 2007-2008 dated September 30, 2008
10. January 30, 2009, County Report without attachments
11. Section 4.4.4.4.2 "Treatment Control BMP Prioritization" of the County's Jurisdictional Urban Runoff Management Program submitted March 24, 2008
12. BEN Calculation Summary
13. Calculation of avoided construction inspection costs